Dependable Storage, Inc. *and* Machinery, Scrap Iron, Metal and Steel Chauffeurs, Warehousemen, Handlers, Helpers, Alloy Fabricators, Theatrical, Exposition, Convention and Trade Show Employees Union, Local 714, affiliated with the International Brotherhood of Teamsters, AFL–CIO. Case 13–CA–32926

April 15, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On May 31, 1996, Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Union's original charge, dated October 24, 1994, alleged, inter alia, that the Respondent had refused to bargain in good faith by engaging in surface bargaining in violation of Section 8(a)(5) and (1). The amended charge, filed May 22, 1995, alleged, inter alia, that the Respondent had granted a wage increase in June 1994 as an inducement for the employees to vote against the Union, in violation of Section 8(a)(1). The complaint alleged an 8(a)(5) violation and an 8(a)(1) violation. With respect to the latter, the complaint tracked the language of the amended charge. The judge dismissed the 8(a)(5) allegation, but found that the otherwise untimely allegations of the amended charge concerning the wage increase could be litigated because they were "closely related" to the allegations of the original and timely filed charge. In so finding, the judge stated the refusal-to-bargain charge implicitly encompassed the claim that the Respondent's refusal to grant a first-year wage increase was maintained in bad faith. The judge noted that in arguing against a wage increase in the first year of the collective-bargaining agreement, the Respondent alluded to the June 1994 increase, stating that because it had granted such an increase before the election it would not agree to the Union's bargaining demand for a first-year increase. Thus, the judge concluded that the Respondent's grant of the increase in June 1994, allegedly in violation of Section 8(a)(1), was at least arguably part of a single sequence of events, culminating in a refusal to grant such an increase in October 1994, allegedly in violation of Section 8(a)(5).

The Respondent excepts and argues that the 8(a)(1) wage increase allegations are not closely related to the Section 8(a)(5) surface bargaining allegations and are therefore barred pursuant to Section 10(b). We find merit in the Respondent's exception.

The judge cited the appropriate standard in considering whether the wage increase allegation is "closely related" to the surface bargaining issue, stating that

> In determining whether otherwise untimely allegations may be litigated, the Board looks to see whether they are "closely related" to the allegations of a timely-filed charge. The Board considers whether they "are of the same class as the violations alleged in the pending timely charge," i.e., involve "the same legal theory and usually the same section of the Act." It also considers whether they "arise from the same factual situations or sequence of events as the allegations in the pending timely charge," i.e., that they "involve similar conduct, usually during the same time period with a similar object;" and whether a "respondent would raise the same or similar defense to both allegations, and thus would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the (timely) "allegations." *Redd-I, Inc*., 290 NLRB 1115, 1118 (1988); *Fiber Products*, 314 NLRB 1169 (1994*); Marriott Corp*., 310 NLRB 1152, 1160 (1993).

We disagree, however, with his application of these standards to the facts here. First, the original charge and the amended charge allege violations of different sections of the Act and different legal theories: an 8(a)(5) violation concerning bad-faith bargaining, and an independent 8(a)(1) allegation concerning a wage inducement to vote against the Union. Second, the factual situations are different—one occurring in June 1994, before the election, and the other occurring several months later, i.e., beginning in September after the election, and during bargaining in October with the Union. Indeed, the alleged 8(a)(1) conduct involved the *grant* of a wage increase, while the alleged 8(a)(5) conduct included a *refusal* to grant an increase. Third, the defenses to the respective allegations are entirely different. The defense to the 8(a)(1) allegation involves showing conformity to past practice, while the defense to the 8(a)(5) allegation relates to the Respondent's intent to bargain in good faith in order to reach agreement.

In sum, the only fact these two distinctly different allegations share is that they both involve wages. For the reasons set forth above, we find that the 8(a)(1) and 8(a)(5) allegations of the complaint are not closely related to the timely filed allegations in the original charge, and thus that the independent 8(a)(1) allegation is barred by Section 10(b) of the Act. We accordingly reverse the administrative law judge and dismiss the complaint.

ORDER

The complaint is dismissed.

Sheryl Sternberg, Esq., for the General Counsel.
Lawrence T. Lynch, Esq. and *Ann I. Mennell, Esq. (Foley & Lardner),* for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Chicago, Illinois, on March 25, 1996, based upon a charge filed by Machinery, Scrap Iron, Metal, and Steel Chauffeurs, Warehousemen, Handlers, Alloy Fabricators, Theatrical, Exposition, Convention and Trade Show Employees Union, Local 714, affiliated with the International Brotherhood of Teamsters, AFL–CIO (the Union or Local 714), on October 27, 1994, as amended on May 22, 1995, and a complaint which was issued by the Regional Director for Region 13 of the National Labor Relations Board (the Board) on July 31, 1995. The complaint alleges that Dependable Storage, Inc. (the Respondent), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by threatening employees, soliciting their grievances and granting them a wage increase in order to discourage their support for the Union, by interfering with the rights of employees, including bargaining committee members, by insisting to impasse upon a nonmandatory subject of bargaining as a condition for agreeing to a mandatory subject of bargaining, by failing to bargain collectively and in good faith with the Union and by failing to timely reinstate unfair labor practice strikers. Respondent's timely filed answer denies the commission of any unfair labor practices and asserts a 10(b) affirmative defense.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISICTION

The Respondent, Dependable Storage, Inc., a corporation, is engaged in the business of providing warehouse services at its facilities in Sauk Village, Illinois. Annually, in the course and conduct of its business, Respondent derives gross revenues in excess of $50,000 from the transportation of freight under arrangements with and as agent for various common carriers that operate between several states of the United States. The complaint alleges, Respondent admits and I find and conclude that it is an essential link in the transportation of freight in interstate commerce and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRATICES

A. Background

Dependable Storage is one of several separate companies[2] owned by DSI, Inc., an essentially family-owned holding company. Its president is James Vandeyacht; his brother, Kenneth Vandeyacht, is vice president.

Local 714 commenced an organizing campaign and a representation election was conducted in late July 1994.[3] On August 10, the Union was certified as the exclusive collective-bargaining representative of Respondent's employees in the following unit which was admitted to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehouse employees employed by the Employer at its facility presently located at 21399 Torrence Avenue, Sauk Village, Illinois 60611; excluding all clerical employees, guards, and supervisors as defined in the Act.

B. Alleged 8(a)(1) Violations[4]

1. Solicitation of grievances and threat of plant closure

In late June or early July, after the Union had filed its petition, Respondent held a meeting with its warehouse employees in an effort to dissuade them from voting for representation.[5] James Vandeyacht spoke from detailed notes. His notes, and his remarks, referred to Respondent's purported "family atmosphere," its efforts to be fair with respect to wages and benefits, the financial difficulties of its sister corporation, Distribution Specialists, and its own financial obligations under that company's Chapter 11 bankruptcy proceeding. Also discussed were DSI's weak profitability, wage cuts taken by all those in the corporate offices, and the alleged burdens and effects of union representation.

In the course of his remarks concerning the employer's financial condition, James Vandeyacht referred to its Green Bay facility and James River Corporation, its major customer. He noted that the Sauk Village warehouse had grown because James River had moved its business from the Green Bay warehouse to Sauk Village. James River took everything out of Green Bay, leaving that facility empty, he said. He also stated, I find, that the product could similarly be moved out of this warehouse, implying without expressly stating, that such an action could result from a union victory.[6]

At the conclusion of his prepared remarks, James Vandeyacht asked if there were any questions. As credibly recalled by several employees, he phrased his query in terms of what Respondent could do to retain its "family atmosphere" ; they

[1] The motion to reopen the record, receive a joint stipulation and admit Jt. Exhs. 40 and 41 is granted.

[2] Others include Distribution Specialists, Inc. and a currently inactive construction firm.

[3] All dates hereinafter are 1994 unless otherwise specified.

[4] Respondent asserted a timely 10(b) affirmative defense to these allegations. That defense will be discussed *infra.*

[5] It appears, from the date upon which Vandeyacht created the notes he used in speaking to the employees, that he spoke to them on or after June 29. There were two essentially identical meetings held to reach the employees from all shifts.

[6] I cannot credit his denial of any discussion of relocating the Sauk Village warehouse work. One employee recalled him saying that he could do it, but without mentioning the Union, a second recalled Vandeyacht stating that he could move his product "if worst came to worst," and a third recalled him saying that "possibly the place could be moved . . . to Green Bay . . . if we were union." Given that the meeting was held to persuade employees to vote against the Union, there would seem to have been little reason to discuss James River and its earlier actions in causing the emptying of one warehouse if not to impress upon those employees their tenuous hold upon their jobs. I note that while Mike Quinnette, the Sauk Village manager, was at this meeting, he was not called to corroborate James Vandeyacht or to contradict the employees and no explanation was offered for his absence. An inference adverse to Respondent is warranted under these circumstances. *Macy's California,* 305 NLRB 498, 500 (1991).

interpreted this to mean what the employer could do to keep the Union out. Some employees asked about higher wages and better benefits. Their recollections of his responses are inconsistent. Essentially, it appears, he reiterated the themes of his speech, that Respondent attempted to maintain wages and benefits which were competitive with those paid in similar businesses. At most, he promised that Respondent would look into their benefit package to determine whether they were competitive. He told them, also, that Respondent's obligations under Distribution Specialist's bankruptcy precluded further wage increases[7] or a retirement plan.

2. Wage increases

As reflected on Respondent's July 3 payroll register, the unit employees received wage increases shortly after Vandeyacht's speech, probably in the first paycheck after July 3, for the payroll period beginning June 27. An employee who had been earning $7 went to $7.42 (6 percent); the employee earning $9 went to $9.36 (4 percent); five employees at $9.85 went to $10.44 (6 percent); and those earning $11 per hour progressed to $11.66 (6 percent).

James Vandeyacht claimed that Respondent historically gave its employees wage increases in June.[8] The records, however, indicate that the 1993 raise was not given until at least the first payroll period in August. That raise was 4 percent. The 1992 increase was given in the first pay period of June; it was approximately 3 percent. In 1991, the raise was granted in July; at least one employee got slightly over 6 percent. The 1990 raise came in March; that same employee received 1 percent. And, in 1989, the raise was granted in February; that same employee received a nearly 3 percent raise. As that employee testified, he expected a raise in 1994 but did not know when to expect it.

C. The Bargaining and the Strike

The parties met three times through October 13. Robert Riley, Local 714's business agent, and Lawrence Lynch, Respondent's counsel, were the chief spokesmen. Riley's initial proposal, submitted in advance of bargaining, sought substantial increases in each of 3 years and both union security and checkoff.

Respondent presented its proposals at the first meeting, held on September 14. While there was agreement to some of the Union's proposals, Respondent did not agree to either the union-security or checkoff demands and did not make a wage offer.

In the second meeting, held on October 7, Respondent maintained its position on union security and checkoff notwithstanding Riley's references to them as essential. At that meeting, Respondent proposed a wage increase for the third year of the agreement, conditioned upon it having achieved a specified level of profitability. Some agreements were reached but none with respect to wages, union security, or checkoff.

Throughout the third meeting on October 13, the Union sought wage increases in each year of a 3-year agreement. Through a series of proposals (a "final" proposal, a "last and final" proposal, and a "final final" proposal), the Employer gradually improved its wage proposals for years 2 and 3 but refused to grant any increase in the first year. Riley told Lynch that a contract offer which did not include a wage increase in the first year "would not fly"; that there had to be some first year raise for those employees to accept an agreement. Lynch told him that the Company had given its employees a raise back in June or July; at the table, Lynch said, "You've already gotten your raise." Riley replied that the Company's position was unfortunate, that they had "shot themselves in the foot" by giving such a raise during a union campaign.

In this meeting, through the course of its several proposals, Respondent gradually acceded to the Union's demands for some paid holidays and checkoff. It also agreed to pay the union committee members for the time they had spent in bargaining. However, throughout this meeting, the Union continued to seek, and Respondent continued to oppose, inclusion of a union-security clause. Respondent expressed its philosophical opposition to compulsory unionism and maintained that position until its ultimate "final final" offer on October 13. At that time, Lynch offered to include union security if the Union's bargaining committee (consisting of Troy Billingsley and Ken Helmick) would recommend that the employees ratify it.[9] At the conclusion of that meeting, Riley told Lynch that the Union was prepared to take Respondent's last offer to the employees for a ratification vote.

Immediately following this last meeting, Riley and the committeemen returned to the plant to meet with the unit employees. Riley told the committee to let him go through all of the provisions first, after which they would state their recommendations. He started out by telling the employees (those from the first and second shifts) that, as a negotiator and their union representative, he recommended approval. It was, he noted, a first contract and approval would facilitate the start of the bargaining relationship.

[7] Vandeyacht claimed that Respondent was already working on a wage increase when he spoke to these employees; he was unsure whether he told them of that increase in the meetings. One employee recalled that Vandeyacht announced a raise, saying that it was all that the Company could afford and all that they were going to get. Vandeyacht referred to a wage rate of $10.44, he said that $10.44 is the rate to which his wage and that of others at the top of the scale was raised, sometime in early July.

[8] He further claimed that he had told Quinnette to assure the employees, sometime prior to the filing of the petition, that Respondent was working on their raises, although he did not know how large those raises would be. Vandeyacht did not know if Quinnette relayed this information to the employees. As noted above, Quinnette did not testify, no explanation was offered for his absence and the failure to adduce his testimony warrants that I draw an adverse inference concerning what he would have testified. I cannot, therefore, credit Vandeyacht's uncorroborated and self-serving assertion concerning when this wage increase was decided upon.

[9] Billingsley so testified, as did Vandeyacht under cross-examination. I am convinced that Riley's testimony, to the effect that the contingency applied to payment for the committeemen's time spent in negotiations rather than to inclusion of union security, was in error. That position is inconsistent with the language of both the amended charge and the complaint; it is contradicted by Lynch's October 15 letter, to which the Union never objected. And, it is implicitly contradicted by Riley's failure to dispute Lynch's assertions when in mediation, as discussed infra. I note that the employee members of the committee were paid for the time they spent in negotiations on October 13, notwithstanding their failure to recommend the proposal. I also find that the initial testimony of both James and Kenneth Vandeyacht, to the effect that the committee had to recommend ratification *and* the unit employees had to accept the contract without a strike, was incorrect. It was clear that they merely assumed that a positive recommendation from the committee would result in acceptance of Respondent's final offer.

Riley then related the terms of the Employer's offer, leaving the economic terms for last. When he told them that there would be no wage increase in the first year, the employees reacted loudly and negatively, walking out. When they returned, they insisted upon voting and voted unanimously to reject the offer and go on strike. The Union's committee never got the opportunity to voice its affirmative recommendation.

Billingsley held a second meeting with the third shift employees later that night. He repeated what Riley had said, described the Employer's offer and "told them that it's their choice, whatever they want to do." They voiced their objections, particularly to the absence of a first-year raise, and voted to strike.

In Riley's opinion, an offer which included a raise at the start of the contract would have been accepted and the strike avoided. However, on October 14, the employees commenced to strike. They carried signs stating: "Local 714 On Strike" and "Baseball Players Want Millions–All We Want Is Pennies."

On October 15, Lynch faxed the following message to Riley:

> The Company has asked me to advise you that its final contract offer presented to the Union negotiating committee on Thursday, October 13, 1994, will be withdrawn if it is not accepted by the end of business on Thursday, October 20, 1994. *Since the Union negotiating committee did not recommend the Company's final contract offer to the employees, the Union security proposal is no longer considered part of the Company's final contract offer as that proposal was contingent on the committee recommending the Company's offer to the employees.* Please feel free to give me a call if you have any questions. [Emphasis added.]

Riley did not respond to Lynch or otherwise dispute Lynch's claim that the offer of union security was contingent upon the committee's affirmative recommendation.

Upon receipt of Lynch's letter, Riley went to the picket line where he met with 10 or 15 employees. When he told them that Respondent had withdrawn its offer of union security, their reaction was expectedly negative. Some expressed the belief that they would be on strike for a long time.[10]

The parties next met at the offices of the Federal Mediation and Conciliation Service on October 20. In a joint session, before caucusing with the mediator, Riley stated the Union's position. They had gone out on strike because the Company had failed to offer a wage increase in the first year and because it had withdrawn the offer of union security, he said. Riley asserted that the union-security provision should still be on the table inasmuch as the union committee had made no recommendation with respect to ratification.

Lynch stated that since the union-security proposal had been contingent upon the committee's affirmative recommendation, so as to avoid a strike, and since no such recommendation had been made and the employees had gone on strike, that proposal was no longer on the table.[11] Riley acknowledged in that joint meeting that, while he had recommended ratification, the committee had not gotten to make either a positive or a negative recommendation.[12] He explained how the meeting had erupted over the wage increase issue, preventing them from making any recommendation and expressed dismay that the employees were "being penalized" for the committee's inability to make a recommendation under those circumstances.

In the course of the October 20 meeting, Riley sought wage increases on May 1, 1995, November 1, 1995, and November 1, 1996. Respondent revised its offer to provide a wage increase within the first year of the contract, albeit on July 1, 1995. It offered a second wage increase 1 year later, on July 1, 1996, moving up the effective date of that increase.

Through the mediator, the Union acknowledged acceptance of the wage proposal but continued to seek union security. It offered to have the committee "give its full recommendation to the Employer's final contract proposal" if the Employer agreed to union security. The mediator relayed back the Employer's position that union security had been taken off the table when the committee failed to recommend the contract on October 13.

Riley reported the Company's latest offer to the employees at the picket line on October 21. Those present, about half of the workers, found it unacceptable. They were unwilling to return to work without an immediate wage increase. At some point before October 31, Riley met again with the striking employees. At this time, he told them of his belief that, while they would have to litigate for its inclusion in the contract, they "had" union security based upon the Employer's earlier offer. The employees then agreed to accept the Company's last offer.

On October 31, Riley called and told Lynch that they would accept the offer and litigate the union-security issue through the Board. He asked that the strikers be immediately returned to work and that the strike replacements be let go. Shortly thereafter, Lynch told him that the Union needed to get the strikers off the street and that they would be returned to work on an "as needed" basis. Riley agreed to remove the pickets.

The parties stipulated as follows:

> After the Union made an unconditional offer to return to work on behalf of striking employees on October 31, 1995 [sic], the Employer reinstated employees as jobs became available, with the last employee returning to work on November 28, 1994.[13]

Respondent and the Union ultimately executed a collective-bargaining agreement incorporating the Employer's last offer. It did not include a union-security clause.

D. Analysis

1. Section 10(b)

The Union's original charge, dated October 24, 1994, alleged that Respondent had refused "to bargain in good faith by engaging in surface bargaining, withdrawing previously agreed-to items and refusing to bargain over issues of union security"

[10] It is clear that the employees did not understand the distinction between a lawful "union shop" and an unlawful "closed shop." At least some of them assumed that, without union security, there would be separate seniority lists and that the Employer would be free to replace union members with nonmembers.

[11] Riley had no recollection of Lynch explaining that the union-security proposal had been withdrawn because of the committee's failure to recommend the Company's offer but admitted that Lynch may have done so. Lynch did not testify. However, the foregoing is based on the parties' stipulations as to the course of bargaining.

[12] I have found that Riley recommended approval of the contract when he met with the first and second shift employees on October 13. I credit his recollection that, in the October 20 meeting, he said he had done so over Kenneth Vandeyacht's claim that Riley told them that he had recommended neither ratification nor rejection.

[13] No evidence was adduced concerning the strike replacements or the striker's jobs.

in violation of Section 8(a)(5).[14] The amended charge was not filed until May 22, 1995. It alleged, inter alia, that, about June 1994, the Respondent "solicited employee grievances and threatened plant closure" and granted wage increases in order to discourage employee support for the Union, in violation of Section 8(a)(1). It also alleged that "Respondent had restrained and coerced employees in the exercise of their Section 7 rights by attempting to influence the Union's internal ratification procedures," refused to "reinstate employees who had struck . . . because of [the Employer's] unfair labor practices" and "conditioned its agreement to union security, a mandatory subject of bargaining, on the Union's agreement to non-mandatory subjects of bargaining."

The complaint, which issued on July 31, 1995, includes allegations which essentially track those assertions of the amended charge. Respondent contends that those allegations are untimely pursuant to Section 10(b).

In determining whether otherwise untimely allegations may be litigated, the Board looks to see whether they are "closely related" to the allegations of a timely filed charge. The Board considers whether they "are of the same class as the violations alleged in the pending timely charge," i.e., involve "the same legal theory and usually the same section of the Act." It also considers whether they "arise from the same factual situation or sequence of events as the allegations in the pending timely charge," i.e., that they "involve similar conduct, usually during the same time period with a similar object"; and whether a "respondent would raise the same or similar defenses to both allegations, and thus would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the [timely] allegations. " *Redd-I, Inc.,* 290 NLRB 1115, 1118 (1988); *Fiber Products,* 314 NLRB 1169 (1994); *Marriott Corp.,* 310 NLRB 1152, 1160 (1993).[15]

Thus, allegations of 8(a)(1) interrogations, solicitations of grievances and promises of benefit and wage increases, as well as 8(a)(3) discharges, have been found closely related to timely filed charges of discriminatory suspensions where they all arose out of an employer's illegal response to a single unionization campaign and were part of a single course of conduct aimed at precluding union activity. *Marriott,* supra. Similarly, all of an employer's acts which were part of an overall plan to resist unionization were deemed closely related in *Jennie-O Foods,* 301 NLRB 305 (1991). In *Fiber Products,* supra, various acts of reprisal for having engaged in union and protected activity were found to be closely related to allegations of discriminatory discharges. And, in *Redd-I,* supra, the discriminatory discharge of one employee was found to be closely related to discrimination aimed at a number of others.

In the instant case, the outstanding allegations of the timely-filed charge allege various aspects of a refusal to bargain in good faith. These all pertain to conduct occurring after the Union's election victory, once bargaining had commenced. The 8(a)(1) allegations of the otherwise untimely amended charge, however, relate to events occurring during the preelection period, when the Employer was seeking to prevent a union victory. The only connection between them, at least as to the alleged threat and solicitation of grievances, is that they reflect a degree of opposition to the Union; that could be said of virtually all allegations which might be brought against any one employer. They are not of the same class of violation, they involve different sections of the Act, they occurred in different time frames and in separate sequences of events, and they do not involve similar evidence or defenses. I therefore must find that the amended charges, insofar as they allege a threat and solicitation of grievances in violation of Section 8(a)(1), are untimely. I recommend that those allegations be dismissed pursuant to Section 10(b).

Respondent, itself, provided the nexus between the allegation of an unlawful wage increase and the timely filed refusal to bargain charge. That charge implicitly encompassed the claim that Respondent's refusal to grant a first-year wage increase was maintained in bad faith. In arguing against a wage increase in the first year of a collective-bargaining agreement, Respondent alluded to the very increase now contended to have been unlawfully granted, stating that because it had granted such an increase before the election, it would not agree to the Union's bargaining demand for a first year increase. The grant of that increase in July, allegedly in violation of Section 8(a)(1), was, I find, at least arguably part of a single sequence of events, culminating in a refusal to grant such an increase in October, allegedly in violation of Section 8(a)(5). I therefore find that the 8(a)(1) wage increase allegation was closely related to the 8(a)(5) allegation of the timely filed charge.

Similarly, I find that the 8(a)(1) allegation respecting Respondent's alleged interference with respect to the ratification procedure and its alleged discriminatory refusal to promptly reinstate unfair labor practice strikers are "closely related" to the allegations of the original timely charge. The former is part and parcel of the Union's contention with respect to the bargaining over union security, particularly the condition Respondent imposed on its granting of union security; the latter is an outgrowth of the alleged failure to bargain in good faith. Proof of these allegations requires much the same evidence as would be required for proof of the allegations as initially charged.

2. The wage increase[16]

Where an employer grants wage increases during an organizational campaign, the Board will examine all the evidence, including the presence or absence of a legitimate explanation for such increases, to determine whether an inference of improper motivation and interference with employee free choice is warranted. *Stanton Industries,* 313 NLRB 838 fn. 2 (1994), and cases cited therein; *Holly Farms Corp.,* 311 NLRB 273, 274 (1993).

Respondent contends that the wage increase it granted in late June was legitimized by an established practice of granting such raises at that time of year. I cannot agree. Respondent has established no pattern for such increases. Indeed, the increases

[14] It also charged that Respondent had discharged one employee, Carmillo Cardoza, on October 20 because of his participation in an unfair labor practice strike, in violation of Sec. 8(a)(3). That charge was withdrawn prior to hearing.

[15] It does not appear to make any difference whether those belated allegations first surface in an amended charge or in a motion to amend the complaint.

[16] The complaint alleges that Respondent, by *granting* the June 1994 wage increase, discriminated "in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging member [sic] in a labor organization in violation of Sec. 8(a)(1) and (3)." No explication of this unusual contention was offered on brief, no motion was made to correct or amend the complaint and I find no basis for treating this as other than an allegation of an 8(a)(1) violation, which is how it was briefed by both parties.

between 1989 and 1993 were given in varying months, from February through August, never twice in the same month. Except in one instance, each year's increase was given after more than a full year from the prior increase. Moreover, they were given in varying amounts, ranging from 1 to 6 percent. No evidence was adduced of any formula upon which the amount of the raises was based, either in prior years or in 1994. Neither was there any explanation of why an increase was warranted only 10 months after the prior increase in August 1993[17] and in amounts substantially larger than all but one of the prior increases referred to. An increase of so substantial an amount, granted so close to the representation election and only days after an antiunion speech, particularly warrants scrutiny in light of Vandeyacht's claims of economic hardship for Respondent and its parent company, and his assertions of salary reductions for all those in the corporate offices. In the absence of any satisfactory explanation, I am compelled to conclude that the wage increase in late June 1994 was motivated by a desire to unfairly sway employee sentiment in the then pending representation election, in violation of Section 8(a)(1).

3. The bargaining

a. Bargaining for a first year wage increase

Counsel for the General Counsel contends that Respondent refused to bargain over a first year wage increase. By that refusal, it is argued, Respondent violated Section 8(a)(5) "because it constituted a continuation of Respondent's unlawful campaign to dissipate the Union's support and was adopted to retaliate against employees for supporting the Union."[18] Alternatively, it is argued that "Respondent's consistent and intransigent refusal to consider much less bargain over the subject of a first-year wage increase because it had given the earlier July increase frustrated the bargaining process and ultimately led to the strike." This "unyielding refusal" purportedly removed a mandatory subject from the bargaining table before negotiations started and thus violated Section 8(a)(5).

The flaw in this argument is that it seeks to separate out the negotiations for a first-year increase from the rest of the wage negotiations. As important as a first-year raise may have been to the employees, it cannot be so isolated. On the overall subject of wages, I cannot find any refusal to bargain. Respondent clearly bargained in good-faith over wages, repeatedly improving its offers, both as to the amounts and the timing of annual raises.

Even on the limited subject of a first year increase, I can find no refusal to bargain. As to that narrow issue, Respondent explained its position, stating that the employees had already received a wage increase in 1994. Good faith bargaining does not require agreement, only that issues be discussed with an open mind and a willingness to find areas of agreement.[19] Thus, unless there is a per se rule prohibiting an employer from refusing to grant a wage increase in circumstances where it has previously granted one in violation of Section 8(a)(1), I must reject the General Counsel's contention. No such rule, or cases so holding, have come to my attention. Moreover, I note with respect to the contention that Respondent was continuing a campaign to dissipate union support, that there is no evidence that this employer attempted to propagandize its employees to convince them that it, not the Union or collective bargaining, was the sole source of benefits. The other benefits it agreed to in bargaining would have belied any such claim.

b. Union security

If Riley's recollections of the October 13 meeting were to be credited, Respondent offered union security without any conditions. It then withdrew that offer when the employees failed to accept its "final final" offer. If that scenario was the effective one, there could be no 8(a)(5) finding on this issue. While the traditional concepts of contract law are not fully applicable to collective bargaining,[20] the principle that an offer once rejected may be rescinded applies.[21] Respondent was free to withdraw the offer of union security upon the Union's rejection of that offer.

Viewing the issue somewhat differently, Respondent argues that there was never a meeting of the minds on the issue of union security. Riley believed it to have been offered unconditionally; Respondent believed that it was conditioned on the committee's affirmative recommendation for ratification. Absent a meeting of the minds, there was no agreement on this issue. Absent agreement, there can be no unlawful withdrawal.

However, I have found that Riley was mistaken with respect to the absence of a condition. The persuasive evidence, derived from Respondent and corroborated by a union committeeman, establishes that Respondent did offer union security conditioned on a committee recommendation for ratification of its total package. It did so notwithstanding its opposition to union security, in an effort to reach a complete agreement without a strike. That condition was never fulfilled, at least in part because of the uproar over the wage issue.[22] Unless the condition was illegally imposed, the withdrawal was entirely proper.

General Counsel correctly asserts that union security is a mandatory subject for bargaining while union ratification procedures are nonmandatory. See *NLRB v. Borg-Warner Corp.,*

[17] Respondent's claim that employees were inquiring about their raise does not warrant expediting the announcement or the grant of the increase; employees are usually curious about, and desirous of, future wage increases.

[18] The complaint alleges Respondent's alleged refusal to bargain over a first-year wage increase only as a violation of Sec. 8(a)(5) and it was in those terms that it was discussed in opening argument. On brief, however, that same conduct is also alleged by the General Counsel as a violation of Sec. 8(a)(3). I decline to reach this contention as it would be a fundamental denial of due process to consider such an allegation at this late stage of the proceeding.

[19] Stated more formally, good-faith bargaining requires that the parties bargain "with a serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Truitt Mfg.,* 351 U.S. 149, 155 (1956). It "does not compel either party to agree to a proposal or require the making of a concession." *Lucky 7 Limousine,* 312 NLRB 770, 789 (1993), citing *H.K. Porter Co. v. NLRB,* 397 U.S. 99 (1970).

[20] See *Transit Service Corp.,* 312 NLRB 477, 481 (1993), and cases cited there.

[21] See *Sunol Valley Golf Club,* 310 NLRB 357 fn. 2 (1993), enfd. 48 F.3d 444 (9th Cir. 1995), quoting *Hydrologics, Inc.,* 293 NLRB 1060, 1063 (1989).

[22] I note that when Billingsley presented the offer to the third shift, he was not precluded from making a recommendation but expressly refrained from doing so. The complaint alleges that the Union, by its spokesman, fulfilled the condition. The Union had recognized, as early as October 20, that it had not done so and sought to circumvent the condition by arguing that circumstances prevented compliance. On brief, counsel for the General Counsel does not appear to be pressing any contention that, because the condition was fulfilled, Respondent is bound to union security.

356 U.S. 342 (1958); and *Gaywood Mfg. Co.,* 299 NLRB 697, 699 (1990). General Counsel further contends that Section 8(a)(5) is violated when, as here, a party to bargaining conditions its agreement to a mandatory subject of bargaining upon the other's acceptance of a nonmandatory one. As to this, I cannot agree.

In *Borg-Warner,* on which the General Counsel principally relies, the employer insisted, *as a condition for reaching agreement,* that the union agree to a "ballot" clause which would have limited the period for collective bargaining and required the union to submit the employer's last proposal to all employees, members and nonmembers alike, for a secret ballot before striking.[23] The Court, analyzing Section 8(d), noted that the bargaining obligation was limited to the mandatory subjects encompassed within "wages, hours, and other terms and conditions of employment," and found that, as to such subjects, "neither party is legally obligated to yield." As to those subjects outside the scope of mandatory bargaining, the Court noted, "each party is free to bargain or not to bargain, and to agree or not to agree." It held that:

> [G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.
>
> The Court went on, in language more pertinent to the issue here Id. at 348-349:
>
> This does not mean that bargaining is confined to the statutory subjects. Each of the two clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But is does not follow that, because the company may propose these clauses, it can lawfully insist upon them *as a condition to any agreement. [*Emphasis added; footnote omitted.]

The General Counsel's overbroad reading of *Borg-Warner* is similar to the contentions rejected by the Board in *Nordstrom, Inc.,* 229 NLRB 601 (1977). In that case, the employer had proposed an agreement which linked both mandatory and nonmandatory subjects. It offered a wage proposal which was conditioned upon the union's agreement to provisions regarding the union's discipline of employees who crossed the picket line, the union's agreement not to press for reinstatement of certain discharged employees, and the merger of two departments. The union sought to accept the wage increase while rejecting the other terms and claimed that, by doing so, it had reached a final agreement which the employer was obligated to execute.

The Board rejected that contention, stating:

> We believe *Borg-Warner* compels no such result. That a party may not lawfully insist upon the inclusion of proposals nonmandatory in nature is, of course, clear. But the General Counsel's case moves, in our view, beyond that proposition to the extent that it negates the considerable relationships which may exist between both mandatory and nonmandatory subjects. Certainly, nonmandatory subjects . . . can, as a function of cost, bear upon a party's wage-increase proposals. *To say that the proponent of [a nonmandatory subject] cannot insist upon the inclusion of such a proposal means no more than that. It does not mean that once, out of necessity, the nonmandatory proposal is removed from the table, the proponent of the nonmandatory subject is not permitted to alter those proposals which are mandatory in light of the removal of the nonmandatory subject. [*Emphasis added.]

The Board, in Nordstrom, made clear that there was no legal impediment to the linking of mandatory and nonmandatory or permissive subjects of bargaining, at least so long as the inclusion of the permissive subject was not a device to circumvent the general rule that one may not insist on such a provision to impasse.[24]

Such a permissible linking of mandatory and nonmandatory subjects is exactly what I find to have occurred here. Respondent was opposed to union security just as the Nordstrom management was opposed to the wage package sought by the union there. However, in an effort to secure a quick and complete agreement without a strike, and assuming that a favorable recommendation from the union committee would have such a effect, it offered to yield on union security if the committee would recommend the contract to the employees. It did not condition its agreement to a contract on the committee's recommendation, merely its agreement to union security. Under the teachings of *Nordstrom,* I find no 8(a)(5) violation in that conduct.

Having found no refusal to bargain in Respondents' proposal linking union security to the committee's favorable recommendation, and also having found that the union committee failed to make the requisite recommendation, I must reject the General Counsel's contention that Respondent's withdrawal of its offer of union security violates Section 8(a)(5).[25]

Similarly, I must reject the contention that, by seeking to induce a favorable recommendation, Respondent's proposal interfered with the committee members' Section 7 rights. Specifically, General Counsel argued that "Respondent restrained and coerced the employee negotiators into influencing the bargaining unit employees to ratify the contract proposal . . . without regard to whether these negotiators thought that Respondent's contract proposal was in the best interest of the parties." In good-faith bargaining, every proposal is intended to persuade the other side's negotiators to come to a positive conclusion or make a favorable recommendation. Offering a desired benefit or contract provision, in order to reach agreement, may be persuasive; it can hardly be said to be coercive. It is not the proverbial horse's head in the bed, i.e., "the offer you can't refuse." If the recipient of the proposal deems it undesirable, he or she has but to reject it.

It makes no difference that here the Respondent sought to influence the bargaining committee's recommendation on ratification. In *Borg-Warner,* supra, as noted above, the Court found that the employer's proposals (including the "ballot" clause) were lawful, that it was permissible for the employer to propose them (so long as it did not insist on them as a condition of agreement) and that they would have been enforceable had the

[23] The employer also insisted on exclusion of the certified International Union from the contract's recognition clause.

[24] See also *Torrington Industries,* 307 NLRB 809, 812 (1992).

[25] *Dayton Electroplate,* cited by the General Counsel, is inapposite. In that case, when the employees refused to ratify the agreement after a period of good-faith bargaining, the employer, without explanation, withdrew its contract proposal and substituted one which was "extremely regressive." The Board found that the employer had exhibited bad faith by its regressive proposal. Even then, the Board did not order the employer to reinstate its final offer.

union agreed to them. In *Borg-Warner,* the proposals were presented as conditions of agreement and were therefore unlawful. In this case, the Employer's proposal for the committee's ratification recommendation was made as a quid pro quo for union security. The Employer did not go to impasse over the ratification-recommendation issue and, I find, there was no unlawful interference, restraint, or coercion in its proposal.[26]

4. Reinstatement of the strikers

The strike was caused by the employees' dissatisfaction over Respondent's refusal to grant a first-year wage increase. Their dissatisfaction was exacerbated by Respondent's withdrawal of the union-security proposal. However, I doubt that the strike would have ended one moment sooner had Respondent granted union security but continued to refuse a first-year increase. In any event, I have found neither bad faith nor any other violation in Respondent's positions with regard to either of these issues. Accordingly, I find that the strike was, from its inception to its conclusion, in pursuit of economic goals. As there is no contention that Respondent failed to properly reinstate the employees as economic strikers, I shall recommend dismissal of the allegation that they were discriminatorily denied timely and proper reinstatement.

[26] *Newtown Corp.,* 280 NLRB 350, 351 (1986); and *Childers Products Co.,* 276 NLRB 709, 710–711 (1985), cited for the proposition that ratification "is an internal union matter not subject to employer interference" are both distinguishable. In those cases, the employers sought to impose, *as conditions for reaching agreement*, ratification procedures which were not required by the contract or agreed to in negotiations.

CONCLUSIONS OF LAW

1. By granting employees wage increases in order to undermine their support for the Union and to influence the outcome of a pending representation election, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. Respondent has not, in any other manner alleged in the complaint, violated the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Nothing in this decision or order, however, requires that Respondent revoke or withdraw the wage increase which I have found to have been unlawfully granted.

[Recommended Order omitted from publication.]